United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

ORIGINAL

76-4226

United States Court of Appeals

FOR THE SECOND CIRCUIT

BRITISH AIRWAYS BOARD,

Petitioner,

against

CIVIL AERONAUTICS BOARD,

Respondent.

ON PETITION FOR REVIEW FROM THE CIVIL AERONAUTICS BOARD

PETITIONER'S REPLY BRIEF

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Preliminary Statement

A. The Challenged Board Action

The crux of this case is quite simply that the Board, without giving notice or any opportunity to be heard, summarily issued an order that, if complied with, would have wreaked substantial injury upon the business and license rights of British Airways. The Board evidently acted without any real understanding of the impact its order would have upon British Airways and, since then, has steadfastly attempted to ignore that impact rather than face up to the fact that a Part 213 "schedule filing" order is not always so benign as had been assumed in the adoption of Part 213.

British Airways detailed the substantial adverse effects of the Board's Order 76-9-74 in its initial brief at pages 8-12. The Board has not challenged the existence or the extent of any one of those adverse effects, but rather has attempted to dismiss them all as a "parade of horribles" that is "largely illusory" (Board Brief, p. 29, n.18). There is nothing "illusory" about the matters detailed at pages 8-12 of British Airways' initial brief, including the undisputed fact that the normal scheduling requirements of British Airways' business were in *actual conflict* with the Board's order in a number of instances even during the brief period it remained in effect.

The Board has conceded that the "30-day advance-notice requirement with regard to *schedule changes* could have impact," but has asserted without any explanation whatsoever that "its effects are certainly manageable" (Board Brief, p. 29, n.18). British Airways has not contended that compliance with Order 76-9-74 would have bankrupted it, or even that it would have had to shut down its opera-

tions in the United States as a result of the order. If this is what the Board means by "manageable" effects, we readily concede the point. The fact remains, however, that the order deprived British Airways of valuable permit rights, such as the right to conduct extra sections of flights, and compliance with it would have caused substantial loss of revenue, mandated significant cost increases, inconvenienced the patrons of the service and placed British Airways at an operating disadvantage vis-a-vis its competitors. Whether or not these effects are "manageable," the Board is not empowered to impose them without at least an opportunity for the carrier to be heard and without the approval of the President.

The Board's brief (pp. 14, 29, n.18) emphasizes that the Board, in its order denying British Airways' motion for a stay, stated that,

> "The [schedule filing] order would not, as speculated, preclude true emergency changes concerning rerouting or changes in equipment type and the like. It does not purport to constitute a preclusion against emergency deviations as a result of unanticipated operational requirements."

This statement was in response to British Airways' observation in its stay motion to the Board that Order 76-9-74, by its terms, appeared to preclude such things as rerouting flights to pick up passengers stranded by an equipment failure (e.g., rerouting a Chicago-London flight into New York) or its frequent requirement for routing U.K.-Canada flights into the U.S. as a result of Canadian labor difficulties (A.10). Notwithstanding that the actual terms of the order remained unchanged, British Airways accepted the Board's explanation of its intention and such "emergency" deviations have not even been mentioned on this appeal. However, if the Board's brief intends any implication that the so-called "emergency" exception extended to matters such as those listed at pages 8-12 of

British Airways' initial brief, it is simply wrong. Those are very routine schedule change requirements and British Airways received informal confirmation from the Board that such matters were covered by the order.

The Board has sought by inference to minimize the Court's perception of the adverse impact of its order upon British Airways, noting that British Airways was the only one of the five U.K.-flag carriers covered by the order that refused to comply (Board Brief, p. 13). The facts are that the only other carrier of any size, British Caledonian, is conducting no scheduled operations to the U.S. and its "compliance" consisted of filing a statement to that effect. The remaining three carriers—Air BVI, Cayman Airways and LIAT (1974) Ltd.—are very small carriers operating limited services within the Caribbean having nothing like the diversity of equipment types, configurations or routes of British Airways. No inference lies from their different reaction to the order in their very different circumstances. British Airways we believe conducts the most extensive and diverse operations to the U.S. of any foreign airline. Possibly the damaging effects of a Part 213 "schedule filing" order upon it are uniquely burdensome, but they are very burdensome none the less.

The Board is finally reduced to arguing that, whatever the effects of the "schedule filing" order, British Airways was "free to ask for a waiver of the 30-day notice requirement" from the Board in any given instance (Board Brief, p. 29, n. 18). As a practical matter the Court will understand this possibility provided scant comfort to a carrier that had just seen the Board sharply divide over the question of whether to permit a long-planned adjustment to its premier Concorde service where the failure to do so would have caused substantial inconvenience to passengers who booked in good faith and a crushing commercial blow to the carrier. Passions at the Board were obviously running high over the U.S.-U.K. dispute and

the Concorde service was not even involved in that conflict. Legally, of course, the Board's waiver power is immaterial. British Airways' permit rights do not depend upon the day-to-day vagaries of the Board's mood. It is entitled to be heard *before* restrictions are imposed upon its operating rights and is entitled to have the political judgment of the President on the facts of record.

The rights denied by Order 76-9-74 and the burdens upon British Airways of complying with it have not, in any meaningful sense, been disputed by the Board. The alternative of noncompliance was equally untenable given the civil and criminal penalties provided in Sections 901 and 902 of the Act, including the Board's practice of summarily seizing foreign aircraft involved in what it believes to be violations of its orders. (See, Appendix A hereto). That was the dilemma that caused British Airways to seek redress in this Court.*

B. Factual Background

The Board's brief expands upon, and in some respects mischaracterizes, the U.S.-U.K. dispute over capacity levels in an apparent attempt to persuade the Court of the righteousness of the political cause in which Part 213 was invoked. The merits of the political controversy—amicably resolved between the U.S. State Department and the British Government—are not in issue here. No questions concerning the right of the United States to take effective countermeasures against a foreign government that it believes has violated an international agreement are present.

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* It will be recalled that British Airways petitioned for review prior to the Board's partial vacatur of the "schedule-filing" order (and after the Board advised it was not disposed to vacate the order) and that its petition was accompanied by a motion to this Court for a stay pending review. On the eve of its time to answer that motion the Board partially vacated the "schedule filing" order and sought a stipulation to withdraw the pending motion for a stay.

The power of the Board, *with* the approval of the President and *after* hearing, to impose restrictions upon British Airways' permits has not been questioned. Indeed, no issue is directly presented concerning a *summary* curtailment of foreign carrier operations with the approval of the President under Part 213 or otherwise.* All that is involved here is the question whether the Board, acting alone as an independent agency of Congress, may consistently with its statutory powers summarily curtail foreign permit rights for political reasons. Congress has given the Board no such powers.

While British Airways does not propose to debate the merits of the political dispute, the Court deserves a more accurate perception of the events giving rise to the actions under review than the Board's brief would give it.

The Board has characterized the United Kingdom diplomatic note of August 12, 1976, reproduced as Appendix C to the Board's brief, as a "decree" or "fiat" that had the effect, albeit prospective, of reducing planned levels of U.S.-flag capacity on the Miami-London and Chicago-London routes and "freezing" planned capacity levels on six other routes (Los Angeles, Boston, New York, Washington, Detroit, Philadelphia-London) as from November 1, 1976. (Board Brief, pp. 1-2, 10-11). This is inaccurate in several respects. The August 12 note was just that—a diplomatic note. Any United Kingdom action to compel curtailment of capacity levels would have taken the form of licensing action to restrict the U.K. permits of the carriers concerned and would have been subject to judicial review. No such action was ever taken or even

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* Compliance with a Part 213 "schedule filing" order of the Board has not been regarded as an essential prerequisite to submission of a "second stage" Part 213 order to the President for curtailment of a foreign carrier's schedules. Indeed, the Board submitted just such an order to the President in this case (A.30), notwithstanding the failure of British Airways to file schedules or otherwise comply with Order 76-9-74.

commenced. The Board's assertion that the action proposed by the United Kingdom entailed a "freeze" on six routes other than Chicago-London and Miami-London is also inaccurate. As the Board should be aware, the British authorities notified National Airlines and Trans World Airlines of proposed capacity limitations concerning the Miami and Chicago routes respectively, and proposed no action to affect capacity on any other routes.

The Board's brief strongly intimates (pp. 1, 10) that the proposed United Kingdom action on winter capacity levels was a direct outgrowth of what the Board calls the United Kingdom "denunciation" of the Bermuda Agreement. The Board mischaracterizes the U.K. action on the Bermuda Agreement as one taken "because the capacity principles embodied in the agreement do not guarantee an equal division of the traffic in the U.S.-U.K. markets" (Board Brief, p. 10, n.6), leading the Court toward the incorrect inference that such a division was the U.K. objective as regards its proposed action on winter capacity. The overall impression the Board would create is one of the United Kingdom, finding it could not live with the terms of the agreement, "denouncing" the agreement and taking unilateral action prohibited by the agreement without even waiting for its termination to become effective.

In fact, the U.S.-U.K. capacity control dispute had little to do with the actual terms of the Bermuda Agreement. As the Board notes in its brief, each nation exercises exclusive sovereignty over its airspace in international law and actions such as proposed by the United Kingdom for this past winter are presumptively valid unless a state has granted inroads on its sovereignty by international agreement. The Bermuda Agreement, by terms, provides no such inroads on sovereignty. The U.S. legal position has been that such inroads were implied in the September 19, 1946 joint press statement of the two governments, attached to the Board's brief as Appendix G. The United Kingdom position has been that the 1974 joint press statement

(A.61) and the joint record of discussions signed at Washington on August 22, 1975 (the relevant provisions of which are reproduced as Appendix B *infra*) reflected an affirmative commitment of the two governments to reverse a long history of excessive capacity in light of the exigencies of the international fuel crisis and unfavorable airline financial results, including the near bankruptcy of the principal U.S.-Flag carriers serving the U.S.-U.K. routes.

The so-called "denunciation" of the Bermuda Agreement by the United Kingdom was in fact a request by it to renegotiate the agreement. On June 22, 1976 the U.K. by note requested consultations under Article 13 of the agreement for that purpose and pending the outcome thereof gave the requisite one year's notice of termination. The reasons for this action were expressed in the U.K. note which has become public and is attached hereto as Appendix C for the Court's information. They relate to the economics of the route exchange (primarily in areas other than the Atlantic), the unworkability of the rate provisions and, of course, the difficulties in interpreting and applying the capacity provisions. An equal division of traffic is not among the reasons.* While negotiations looking to a new or revised agreement are in progress the Bermuda Agreement remains very much in force as the charter governing the world's most important commercial international air routes. Both countries continue to assert all their rights and to enjoy substantial benefits under the agreement, and neither has so much as suggested that any of its own obligations are suspended.

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* The Board's gratuitous observation that this alleged U.K. claim has also been the chief obstacle in renegotiation of the agreement (Board Brief, p. 10, n. 6) is inaccurate as well. The chief obstacle to negotiations in the view of most observers has been sharp divisions within the U.S. over the merits of the U.K. negotiating position and the absence of policy leadership during the changeover in the U.S. Administration. The first negotiating session with U.S. representatives appointed by President Carter took place February 28-March 11 and a second session is scheduled to commence March 28.

The Board has dredged up an earlier dispute not related to this case for the inflammatory purpose of demonstrating that "[t]his was not the first time in 1976 that the U.K. Government had imposed unilateral restrictions on capacity levels to be operated by U.S. carriers" (Board Brief, p. 11, n.7). The facts are that, notwithstanding the explicit written understanding of August 22, 1975 (Appendix C *infra*) between the two governments to encourage their carriers to negotiate capacity agreements, the Board had failed to act upon the application to authorize U.S. carriers to enter into such negotiations for the summer of 1976, thus frustrating the intergovernmental agreement. The U.K. Department of Trade responded by advising the carriers that it would prescribe capacity levels in the absence of negotiations among the carriers. The Board promptly granted the authority for U.S. carriers to enter into negotiations and the U.K. Government allowed them to proceed in accordance with the intergovernmental understanding. The U.S. note quoted by the Board was delivered after the fact to formally record U.S. opposition to any unilateral action.

Finally, the Board's brief (pp. 2, 15-16) strongly infers that the political resolution of the winter capacity dispute was a "retreat" by the United Kingdom which "rescinded the restrictions imposed by their August 12 note," impliedly at the point of the Part 213 gun. The settlement of course was a negotiated one that both governments have described as mutually acceptable and both governments preserved their juridical positions. The capacity levels finally agreed were pretty much as sought by the United Kingdom as can be seen from a comparison of Appendices C and D to the Board's brief. The governmental settlement, it may be noted, relieved the carriers of both countries from an antitrust predicament flowing from the fact that they had discussed winter capacity levels inconclusively or had actually reached agreements that had not been governmentally approved.

C. The Enforcement Action

Two days after British Airways' initial brief was filed in this Court the Board's Bureau of Enforcement commenced an administrative enforcement proceeding against British Airways for alleged violation of Order 76-9-74 as reconstructed *nunc pro tunc* by Order 76-10-110.* The objective of the proceeding is to penalize British Airways for violating an order that never in fact existed—namely an order to file existing schedules that did not contain a 30-day advance schedule filing requirement. The Board, which in Order 76-10-110 vowed not to "stand idly by and permit its orders to be ignored (if not flaunted) without fear or risk of enforcement liability" by British Airways (A. 64), will adjudicate the matter. By agreeing not to contest the proceeding if it lost in the instant litigation on the merits, British Airways was able to negotiate a postponement of the enforcement case until 15 days after final decision herein.

ARGUMENT

I. The Board's Violations of Sections 402(f) and 801(a) of the Act.

British Airways has demonstrated that the Board's action in summarily issuing Order 76-9-74 imposed restrictive conditions and limitations upon the operating rights contained in its foreign air carrier permits without the notice, hearing and Presidential approval required by Sections 402(f) and 801(a) of the Act (Initial Brief, pp. 17-30).

The Board's response, as anticipated, has been to assert that there was no curtailment of permit rights since the Board was acting pursuant to a condition in the permits

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* The Court will recall that Order 76-10-110 was issued after this Court was seised of the case and is subject to "any necessary approval" of this Court (A. 65).

reserving the right to impose such curtailment at any time without notice, hearing or Presidential approval (Board Brief, pp. 28-31). British Airways has contended that the Board is not free to "bootstrap" itself out of the limitations Congress placed upon its permit amendment powers by reliance upon such a condition, citing *C.A.B.* v. *Delta Air Lines, Inc.*, 367 U.S. 316 (1961) (Initial Brief, pp. 26-28).

The Board's effort to distinguish the *Delta* case is wholly without merit. The facts in *Delta* were far more favorable to the Board than those of the present case and the principles of that decision are *a fortiori* governing here. In *Delta* the Board had prior to effectiveness of Delta's certificate explictly reserved the right to reconsider the certificate upon decision of petitions for reconsideration which were then pending. There was at least some defense for the Board's action based upon an implied power to adopt procedures arguably necessary to an orderly administrative process. The Supreme Court paid great deference to the Board's need to order its administrative affairs but, nevertheless, found the Board was not empowered to deviate from the hearing procedures mandated by Congress. No such countervailing administrative consideration is present in this case. Here the Board has purportedly reserved *for all time* the right to reconsider and impose restrictions on the operating authority granted in light of *changed* circumstances, without following the notice, hearing and Presidential review procedures mandated by Congress. Here the Board has acted years after the fact to impose such restrictions in a proceeding wholly unrelated to the original permit case and for reasons far removed from the record before it therein. In the present case the Board has attempted to do *directly* what the Supreme Court in *Delta* said it could not even do *indirectly* upon decision of petitions for reconsideration. (See, 367 U.S. at 328-329).

British Airways also demonstrated in its initial brief (pp. 23-24) that the Board's "schedule filing" order herein

was based at least in part upon provisions of Part 213 that were never even arguably made a condition of British Airways' permits, and the Board's assertion that it was simply invoking a condition to which British Airways' operating rights were specifically subject was false. In its brief (p. 19, n.12) the Board concedes the truth of this contention but now shifts its ground to argue that the "schedule filing" order was "based *principally* on findings required by Section 213.3(c) as originally adopted" (emphasis added). It seems presumptuous to speculate which findings "principally" influenced the Board in a case where it acted summarily and there is no record. In any case, the *material* fact remains that the Board to some extent acted under provisions which even it does not contend comprised a condition to British Airways' operating rights.

The Board's continued reliance upon the decision in *Dan-Air Services Ltd.* v. *C.A.B.*, 475 F. 2d 408 (D.C. Cir. 1973), is misplaced for reasons already noted at pages 28-29 of our initial brief. In its brief (p. 29, n.18) the Board asserts that *Dan-Air* is not distinguishable on the ground that the *purpose* of the permit condition involved there differed from the purpose of Part 213. We agree. The material distinctions lie in the different *effects* of the Board's actions in the two cases and the fact that the Board here was not in fact acting pursuant to a permit condition. In *Dan-Air* the Court was able to say:

> "This order is in complete accordance with the provisions of these permits and in no way diminishes their operating authority." 475 F. 2d at 413.

The Board's action here under review was not in "complete accordance" with the provisions of British Airways' permits, as has been noted. More importantly, the Board's action here had the *effect* of taking away valuable operating authority contained in the permits, such as the right to operate extra sections of flights. This is in sharp contrast to *Dan-Air* where the effect of the Board's action was to

insure compliance with the operating authority granted in the permit in the face of compelling evidence that the carrier had been conducting unauthorized operations.*

The Board has argued that its denial of a hearing to British Airways was not an "abuse of discretion" since the possible invocation of Part 213 was noted in U.S.-U.K. intergovernmental discussions and the Board's issuance of the "schedule filing" order was "purely a policy matter as to which no material disputed facts existed which required a hearing for their resolution" (Board Brief, p. 43). The answer to this contention is, of course, that the Board had no discretion to deviate from the statutory requirement for a hearing. As stated by the Supreme Court in the *Delta* case:

> "We do not think it too much to ask that the Board furnish these minimum protections as a matter of course, whether or not the Board in a given case might think them meaningless. It might be added that some authorities have felt strongly enough about the practical significance of these protections to suggest that their presence may be required by the Fifth Amendment." (367 U.S. at 331-332)

Moreover, even if the Board were thought to have had some discretion, the denial of a hearing in this case was clearly improper for the reasons stated at pages 21-22 of British Airways' initial brief, including the obvious fact that the Board evidenced no appreciation of the practical effects its action would have upon British Airways' operations and service to the public. It is difficult to see how the Board could make the "public interest" determination called for by Part 213 without any consideration of these questions. In this case the Board acted against British

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* It may also be noted that the *Dan-Air* case involved charter permits not granted under any bilateral agreement and the case is not germane at all to the limitations placed on the Board's powers by Section 1102 of the Act, discussed *infra*.

Airways (which was accused of no wrongdoing whatsoever) with reckless disregard of the consequences upon British Airways or the totally innocent patrons of its services.

The Board defends its failure to seek Presidential approval for its action under Section 801(a) of the Act on the ground that Part 213 does not by terms require or appear to contemplate such approval for a "schedule filing" order (Board Brief, p. 30). We have already noted that the Part 213 case never focused on the impact such an order might have on operating rights and that the regulation does not purport to prohibit recourse to Presidential approval in an appropriate case where Section 801(a) requires it (Initial Brief, pp. 16, 35). The Board's further argument that there are international actions it may take without Presidential approval, citing *Northwest Airlines* v. *C.A.B.*, 539 F. 2d 748 (D.C. Cir. 1976) and *Pan American World Airways* v. *C.A.B.*, 261 F. 2d 754 (D.C. Cir. 1958), cert. den. 359 U.S. 912, is misplaced (Board Brief, p. 30, n. 19). Those cases indicate at most that the Board may grant a temporary exemption from the certification requirements of the Act under its explicit Section 416(b) exemption power as to U.S. carriers without Presidential approval; they do not carve any exceptions out of the language of Section 801(a) as the Board would do here. The Board's actions were reversed in both cases for denial of hearing (*Northwest*) or inadequate findings (*Pan American*). Moreover, the Board's citation of this authority for the proposition stated is misleading without at least calling to the Court's attention the *contrary position of the President and the U.S. Justice Department* as expressed to the Board only two months ago in reference to the *Northwest* decision. (See, December 31, 1976 letter of President Ford to CAB Chairman Robson, annexed hereto as Appendix D.)

The Board's brief maintains *absolute silence* concerning the Board's inexplicable refusal to accede to the President's request for "prompt rescission" of the Board's

action here under review (A. 39). The Board's brief makes quite clear the Board's own view that Part 213 powers derive their legitimacy from the President (pp. 34-36). While we cannot agree that the Board has any powers not derived from Congress, and certainly not powers that conflict with the procedural and substantive limitations of its statutory mandate, nevertheless, we note the irreconcilable conflict in the Board's own position. If, as the Board asserts on brief, its action here was the "preliminary cog" in a process "established . . . by the President" (p. 35), and the "validity" of that process is unreviewable as action of the President (p. 18), then there can be no lawful basis for the Board's failure to obey the President's direct request for "prompt rescission" of that action. There could be no basis for the Board's assertion in its Order 76-10-110 that it was acting "as an independent agency" in this matter (A. 64). The Board's asserted effort to "strike an appropriate balance" between "the public interest in the nation's foreign policy which was of concern to the President . . . and the public interest in obedience to Board orders" (A. 64) was simply rank insubordination under the Board's theory of this case. If that theory were accepted, the Court would be obliged to set the Board's action aside on that ground as a violation of Section 801(a).

II. The Board's Violation of Section 1102 of the Act.

British Airways demonstrated in its initial brief (pp. 8-12, 31-34) that the Board's "schedule filing" order placed British Airways at a significant operating disadvantage vis-a-vis its U.S.-flag carrier competitors, in contravention of the "fair and equal opportunity" provision of the Bermuda Agreement, and in plain violation of the Board's duty under Section 1102 of the Act to act "consistently with any obligation assumed by the United States in any . . . agreement that may be in force between the United States and any foreign country."

The Board's response has been to argue that the "contention that a schedule filing order violates the bilateral" is at odds with the "practical construction" given the Bermuda Agreement by the United States, the United Kingdom and "many foreign governments" which the Court should accept as authoritative under international law principles (Board Brief, pp. 32-35). This argument is based upon factual premises that are so demonstrably false as to be shocking. Moreover, the argument itself largely misses the point of British Airways' contention concerning the "freeze" placed on its operations by the Board's "schedule filing" order.

The first and most astonishing step in the Board's "state practice" argument is the contention that the adoption of Part 213 represented a "practical construction" that orders for advance filing of schedules for approval "do no violence to Bermuda principles" (Board Brief, p. 32).

Compulsory advance filing of schedules for government approval is the very quintessence of capacity "predetermination" that the United States vigorously contends is prohibited by the Bermuda principles. The Court need look no further than the pronouncements of the U.S. Department of State quoted in the Board's own brief at pages 5-6 and 11 (n. 7) to ascertain the U.S. Government position and the absurdity of the Board's contrary suggestion in this case. United States practice in this regard has been succinctly stated by Professor Lowenfeld of New York University, based upon his years of aviation responsibility in the U.S. State Department, as follows:

> "[T]he United States carriers have always resisted, with U.S. Government support, any requirement for filing of schedules (other than for information) with any other government, because such a move might imply the opportunity for approval or disapproval,

and might thus be the first step to the dreaded concept of predetermination."*

The adoption of Part 213 did not in any sense represent a "practical construction" of the Bermuda Agreement to the contrary. Indeed, in its order adopting Part 213 the Board explicitly declared:

> "As the Board has emphasized, however, it has never intended to substitute its Part 213 powers for the Bermuda plan of initial management discretion, with subsequent *ex post facto* governmental review." (Board Order 70-6-32, Appendix B to Board Brief, p. 5)

In the same order the Board reiterated as it had in previous orders in the Part 213 case its position that:

> "Although the proposed regulation would empower the Board to require foreign carriers to file their schedules, the regulation would not be self-executing. Unless the Board affirmatively invoked the regulation, each foreign carrier would be entirely free to determine its schedules (including equipment) for operations to or from this country." (Id., p. 1)

As we had occasion to note in our initial brief in a different context (pp. 35-36), the Board emphasized in the Part 213 case that it would not undertake such affirmative invocation of the regulation when to do so would be inconsistent with bilateral agreement obligations:

> "The Board contemplates no action at any time which would be inconsistent with any outstanding international agreement, treaty, or convention. On the other hand, it must be recognized that bilateral agreements are subject to amendment after consultations of both of the parties thereto at any time and that such

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* Lowenfeld, "CAB v. KLM; Bermuda at Bay," 1 *Air Law* 2, 9 (1975).

> agreements are also subject to denunciation by either of the parties at any time." (Board Order E-17537, October 4, 1961, 34 CAB 838, 839)

In adopting the 1974 amendment to Part 213, the Board again emphasized that the regulation did *not* represent a construction of bilateral agreements and that there could be cases in which such agreements would prohibit the Board from invoking it, as follows:

> "[A]s the Board noted in its rulings on motions in the *Part 213 Foreign Permit Investigation,* there is no necessity here to determine the proper interpretation of bilateral agreements. As the Board there stated:
>
> > 'The important point is that there are many actions the Board could take in various situations under the regulation without raising this problem. The mere possibility that there may be specific situations in which the Board could not properly act under the regulation does not impair the Board's power to promulgate such a regulation or affect its validity under the Act.' (34 CAB at 844)"
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> Board Regulation ER-870, July 12, 1974, p. 4, 39 F.R. 30842.

The second step in the Board's "state practice" argument is the assertion that the United Kingdom's "practical construction" of the Bermuda Agreement has been that the requirement of advance schedule filing for approval is proper, based upon the fact that in one instance the United Kingdom imposed such a requirement in the license of the U.S. all-cargo airline, Seaboard World Airlines (Board Brief, p. 32, n. 20 and Appendix E).

The United Kingdom does not impose advance schedule filing requirements upon any of the U.S. airlines, other than Seaboard, operating under the Bermuda Agreement and does not normally impose such requirements upon the

airlines of other states with which it has Bermuda-type bilateral agreements. The Board's suggestion that the Seaboard case represented a "practical construction" that such conditions are proper under the agreement is totally misleading. In the Seaboard case the British authorities had found that Seaboard was operating in violation of the route authority granted in the Bermuda Agreement and had been publishing its schedules in a deceptive manner to disguise this practice. Under Article 6 of the Bermuda Agreement (A. 83) they could have revoked the carrier's operating rights altogether in these circumstances. Instead they elected to impose more stringent licensing conditions, notably the advance filing of Seaboard's schedules for approval. Seaboard's schedules are in fact reviewed to insure compliance with the British Government's construction of the Bermuda Agreement route authorization and the carrier is not constrained from changing equipment, operating extra sections or additional frequencies, altering arrival and departure times or days of operation, and as an all-cargo carrier is not concerned with changing seating configurations.

Finally, the Board's "state practice" argument asserts:

> "'Many foreign governments' with which the United States has bilateral agreements assert the right and exercise the power to require U.S. carriers to file their schedules for advance approval (Order 70-6-32, App. B, *infra*)." (Board Brief, p. 32)

While the practice of other states is not germane to the construction given the Bermuda Agreement by the parties to it, we, nevertheless, note the deficiencies in this contention of the Board. We note first that the "many foreign governments" language the Board places in quotations does not even appear in Order 70-6-32, appended to the Board's brief. More importantly, however, there is no statement in that order, adopting Part 213, that conveys the substance that the Board's brief attributes to it. The

Board made the following statement in Order 70-6-32:

> "The record demonstrates that there are a substantial number of countries which possess the power to require U.S. carriers to file schedules and to disapprove such schedules, that a number of them do not hesitate to exercise such powers, and that there have been unwarranted disapprovals of the schedules of U.S. carriers." (Appendix B to Board Brief, p. 3)

This statement, moreover, was made as to foreign countries generally and did not purport to describe the situation regarding countries with which the United States has bilateral agreements.

The Board's "state practice" argument, inaccurate and misleading as we have shown it to be, is not in any case fully responsive to British Airways' contentions under Section 1102 of the Act. At most the argument suggests that schedule filing for approval is practiced by states. If true, this could only meet so much of British Airways' complaint as is directed to the Board's action in subjecting British Airways' schedules to prior approval, with the attendant damaging uncertainties that created for British Airways in the marketplace and with financial institutions (Initial Brief, p. 12). Important as that may be—and we do contend it violated the Bermuda principles and Section 1102—the principal thrust of British Airways' complaint has been directed to the actual denial of operating rights imposed by the 30-day "freeze" the Board placed on its ability to change frequency, equipment, seating configurations, days of operation and arrival and departure times. These are the concrete *operating* disadvantages the Board imposed in violation of the Bermuda Agreement's requirement of a "fair and equal opportunity for the carriers of the two nations to operate on any route between their respective territories" (A. 94). The Board has not shown such a panoply of damaging restrictions to be a normal incident of the schedule approval process

in those countries where it allegedly exists. Certainly the imposition of such damaging restrictions has not been the practice of the United States and United Kingdom under the Bermuda Agreement.

Finally, we note that the discussion in the Board's brief (pp. 34-36) concerning the right of the United States Government to take retaliatory action under international law is immaterial to the Section 1102 question in this case. The only issue here is whether the *Board* exceeded its statutory authority. Whatever retaliatory rights, if any, the Executive Branch may have had under international law in the circumstances of this case, it exercised none and took no action to suspend any U.S. obligations under the Bermuda Agreement. The Board's plain duty and the limit of its powers under Section 1102 of the Act was to scrupulously observe those obligations. This it did not do.

III. The Board's Violation of Part 213.

British Airways demonstrated in its initial brief (pp. 38-40) that the Board's action under review was not consistent with the explicit requirements of the Presidentially-approved Part 213 regulation. The Board's response has been to dismiss this as a "semantic dispute with the findings in support of the schedule-filing order" (Board Brief, p. 41). We are not on this issue concerned with the semantics of the Board's findings but with fundamental *facts*.

The *fact* is that the United Kingdom took no action that restricted the operations of any U.S. carrier at all much less over the objection of the United States. Notwithstanding the Board's mischaracterizations of it as a "decree" or "fiat" the August 12, 1976 diplomatic note of the United Kingdom in fact did nothing to restrict the operations of any U.S. carrier. The *fact* is that appropriate amendments of the U.K. operating permits of

the affected U.S. carriers would have been required to impose any operational restrictions, subject, we might add, to *their* right of judicial review in the United Kingdom. The *fact* is this was not done. Section 213.3(c) of the regulation indisputably requires a finding that a foreign government *has taken* action to restrict the operations of a U.S. carrier and the *fact* is the Board made no such finding and could not properly have done so.

The Board lays heavy emphasis on the fact that the U.S. State Department did not regard the action proposed by the United Kingdom as proper (Board Brief, pp. 39-40). There is no question that the two governments did not see eye-to-eye juridically concerning the right of the United Kingdom Government to take unilateral action, although they were eventually able to agree to take very similar action jointly. Their disagreement on the issue of law did not, as the Board seems to suggest at page 40 of its brief, provide the basis for a finding by the Board that the United Kingdom *had taken* unilateral action to restrict U.S. carriers over the objection of the United States Government.

The Board's argument finally boils down to a contention that it would be "unreasonable" to require the Board to adhere to the terms of Part 213 (Board Brief, p. 42). British Airways adequately addressed that contention in its initial brief (p. 40).

IV. The Court's Jurisdiction and the Scope of Judicial Review

The Board has conceded that the orders complained of by British Airways are reviewable and that this Court has jurisdiction to set them aside for noncompliance with the terms of Part 213 (Board Brief, pp. 18, 37). However, the Board contends that the Court may not review and set aside the *same orders* for the Board's excess of the limitations placed on its authority by Section 1102 of the Act or its failure to observe the notice, hearing and Presidential

approval procedures required by Sections 402(f) and 801(a) of the Act. As stated in the Board's brief (p. 13):

> "Thus, while we do not contend the schedule-filing order is unreviewable, the only reviewable issue is whether that order is consistent with petitioner's permit condition, i.e., with Part 213 itself."

The Board reaches this remarkable conclusion by reference to the provisions of Section 1006(a) of the Act barring review of "any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act." The burden of the Board's argument is that Section 1006(a) would have precluded Court of Appeals review of the Presidentially-approved decision adopting Part 213 (Board Brief, pp. 18-24), and that the major contentions of British Airways herein "are in reality attacks upon Part 213 precluded by the Section 1006 limitation of review jurisdiction" (Board Brief, pp. 24-27).

This proceeding in fact is brought to review the Board's Orders 76-9-74, 76-9-161 and 76-10-110, *not* the decision to adopt Part 213. The orders complained of were not issued subject to the approval of the President and are plainly reviewable under Section 1006(a) as the Board concedes. Section 1006(a) is not concerned with the *scope* of judicial review. By its plain language it is concerned only with which orders are reviewable and which are not. The *scope* of review of orders that are reviewable is prescribed in Section 10(e) of the Administrative Procedure Act, now codified as 5 U.S.C. § 706, which provides in pertinent part as follows:

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action. The reviewing court shall— * * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

* * *

(c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or]

(d) without observance of procedure required by law."

The Board's contention that its action is "reviewable" but that the Court is precluded from inquiring into the Board's statutory authority for it or the lawfulness of the procedures followed by the Board, is thus wholly without merit. The Court is under a plain statutory duty to inquire whether the Board's action was taken "in excess of statutory jurisdiction, authority, or limitations" or "without observance of procedures required by law" and to hold it unlawful and set it aside if it was. The Court cannot be deterred from performing this statutory duty by the fact that the Board seven years ago adopted Part 213, irrespective of whether *that* action would have been reviewable in a Court of Appeals.*

In addition to its legal insufficiency the Board's argument is based upon a totally erroneous factual premise. As noted in our initial brief (pp. 35-36) and at pages 16-

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* It may be noted that the Board's dubious argument that Court of Appeals review of Part 213 was barred under Section 1006(a) falls far short of a demonstration that the action was not *judicially* reviewable. The possibility of review in a district court was left open in each of the cases relied upon by the Board. *Diggs* v. *C.A.B.*, 516 F. 2d 1248 (D.C. Cir. 1975), cert. den. 424 U.S. 910; *Pan American World Airways* v. *C.A.B.*, 392 F. 2d 483 (D.C. Cir. 1968) *British Overseas Airways Corp.* v. *C.A.B.*, 304 F. 2d 952 (D.C. Cir. 1962). With this possibility open there would not seem to be even a logical policy basis for the Board's argument against "collateral" review, quite apart from the plain language of Section 1006(a) of the Act authorizing review in this case and the plain language of 5 U.S.C. § 706 prescribing the scope of that review.

17 *supra*, the Board in adopting Part 213 in fact ducked the issue of interpreting bilateral agreements and the limitations of Section 1102 upon the Board's powers, asserting that the issue went to the Board's application of the regulation in specific cases and recognizing that "there may be specific situations in which the Board could not properly act under the regulation." For the Board to argue now that a specific case has arisen that the issue was foreclosed by Presidential approval of Part 213 is patently wrong and smacks of a shell game. Similarly, in light of the Board's repeated assertions in the Part 213 case that the proposed regulation would not be self-executing, the decision to adopt it cannot be read as foreclosing the question of whether the notice, hearing and Presidential approval procedures of Sections 402(f) and 801(a) should be followed in a specific case. As noted in our initial brief (p. 35), the decision not to follow them in this case was made by the Board, not the President, and was not compelled by the terms of Part 213.

Finally, we would observe that even if the assumptions of the Board's jurisdictional argument were accepted *in toto*, the Court would not be barred from reviewing and setting aside as unlawful the Board's refusal to accede to the President's explicit request for "prompt rescission" of the action here under review as a violation of Section 801(a) of the Act.

Conclusion

For the reasons stated above and in our initial brief, the Board's orders here under review should be set aside.

Respectfully submitted,

WILLIAM C. CLARKE
PETER F. VETRO
Attorneys for Petitioner
British Airways Board

APPENDIX A

Text of Civil Aeronautics Board Press Release 74-155, July 25, 1974.

CIVIL AERONAUTICS BOARD
WASHINGTON, D.C. 20428

FOR RELEASE:

IMMEDIATE
JULY 25, 1974
CAB 74-155

(202) 382-6031

The Civil Aeronautics Board has seized a Philippine Air Lines (PAL) DC-10 aircraft at San Francisco International Airport as security for potential civil penalties which might result from PAL's apparent operation beyond the authority granted in its foreign air carrier permit.

The CAB earlier this month disapproved schedules proposed by PAL, to start July 1, for operation of DC-10 aircraft between the Philippines and San Francisco, California, by way of Honolulu, Hawaii. The Board expressly ordered that those schedules not be inaugurated.

When it learned Wednesday that a PAL DC-10 was in flight over the Philippines-Honolulu-San Francisco route, the Board authorized its Bureau of Enforcement to summarily seize any PAL aircraft in violation of the Federal Aviation Act as it applies to holders of foreign air carrier permits. The DC-10 with 156 passengers aboard was met at the airport and impounded by a U.S. Marshal.

APPENDIX B

Joint Record of US/UK Informal Civil Aviation Discussions, August 20-22, 1975.

US and UK representatives met in Washington on August 20-22, 1975, to discuss several civil aviation questions of current interest, including the following:

* * *

3. The US/UK airline capacity situation was discussed, and it was agreed that both countries desired to avoid the operation of excess capacity harmful to both the airlines and the travelling public, as well as wasteful to fuel, and that capacity agreements offered one means of meeting these problems. The representatives agreed to bring these considerations again to the attention of their respective airlines and to urge them, to the extent permitted by their aeronautical authorities and consistent with their commercial interests, to pursue appropriate accords in markets where there would otherwise be a danger of excess capacity. In the absence of such accords, the representatives agreed that the governments should consult, if necessary, on action to be taken.

* * *

s/ George T. Rogers
George T. Rogers
Under Secretary
Department of Trade

s/ Raymond J. Waldmann
Raymond J. Waldmann
Deputy Assistant
Secretary
Department of State

August 22, 1975

APPENDIX C

Text of United Kingdom Note, June 22, 1976, On Renegotiation of Bermuda Agreement.

[SEAL] WASHINGTON, D.C.

22 June 1976

The Honorable
Dr Henry A Kissinger
Secretary of State of the
United States of America
WASHINGTON DC

Sir,

I have the honour to refer to the Final Act of the Civil Aviation Conference held at Bermuda, 15th January - 11th February, 1946 and Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America relating to Air Services between their Respective Territories [With Annex] Bermuda, 11th February, 1946, as amended, hereinafter referred to as "The Bermuda Agreement".

The Bermuda Agreement has over the years become out of date in a number of respects and no longer corresponds satisfactorily in the view of Her Majesty's Government to the conditions of the 1970s. It has been evident for some time that the benefits the Bermuda Agreement confers on the United States are much in excess of the benefits to the United Kingdom. During recent years, there has been a closer approximation to a balance of earnings from the rights to operate services across the North Atlantic: but it is clear that a substantial revision of the rights conferred by the Bermuda Agreement is needed in order to achieve a more equitable balance of benefits overall.

In addition, the Bermuda Agreement needs improvement in a number of respects in order to make it function more efficiently. The Bermuda Agreement was the first major air services agreement to be negotiated after the Second World War. Its wording is consequently less precise than that of more recent agreements to which the benefits of experience have been applied. A more up to date text is also needed to prevent the difficulties that have increasingly been encountered in its interpretation and implementation. Particular examples are the provisions relating to capacity and to fares.

The capacity provisions of the Agreement, as interpreted up to 1974, worked well in the early post-war years but proved inadequate to withstand the strain of subsequent events. By the early years of this decade, the excessive capacity had led to a serious waste of resources, considerable damage to the financial position of the airlines, and highest fares to the travelling public than would otherwise have been required. These difficulties were exacerbated by the fuel crisis and subsequent slackening in demand. The understandings reached in 1974 and 1975 for establishing a close relationship between the capacity and the demand need to be consolidated into a new agreement and systematic procedures established for implementing them.

The provisions of the Bermuda Agreement regarding the establishment of airline tariffs proved unworkable and have for many years usually been disregarded. The practical consequence has been, as recent events have demonstrated, that one of the parties may act unilaterally without consultation, and without any basis in the Bermuda Agreement for such action, only a few hours before new fares are due to come into effect. This has repercussions on the whole fares structure on the very important North Atlantic routes. To ensure agreed timely resolution of such difficulties a fresh system needs to be devised.

Her Majesty's Government believe that the time has come to renegotiate the Bermuda Agreement as a whole.

Accordingly, they request consultations under the terms of Article 13 and, pending the outcome of such consultations, they serve notice of termination of the Bermuda Agreement, as amended by the Exchanges of Notes of 20 December 1946 and 27 January 1947, of 21 and 23 May 1947, of 14 January 1948, of 4 and 16 August 1955, of 17 and 30 October 1956, of 2 and 28 December 1956 and of 27 May 1966. Such notice will run for 12 months from the date of receipt of this Note. Her Majesty's Government will work constructively with the United States Authorities in order to ensure the establishment of a more equitable and rational agreement.

Her Majesty's Government are informing the International Civil Aviation Organisation of this decision, in accordance with the terms of the Bermuda Agreement.

I avail myself of this opportunity to renew to you, Sir, the assurances of my highest consideration

PETER RAMSBOTHAM
HM Ambassador

APPENDIX D

Text of December 31, 1976 Letter From President Ford to CAB Chairman Robson.

THE WHITE HOUSE

WASHINGTON

December 31, 1976

Dear Mr. Chairman:

I have reviewed and approved pursuant to section 801 of the Federal Aviation Act of 1958, as amended, your opinion and orders in the Pan American World Airways, Inc. —Trans World Airlines, Inc. Route Agreement, Docket 27114, et al.

The procedures initially used by the Board in this case remain the subject of my concern. In order 75-1-133 (January 30, 1975), the Board, purporting to act under sections 401(j), 412 and 416(b) of the Federal Aviation Act, approved an international route restructuring proposal, which it had invited from Pan American World Airways and Trans World Airlines, without opportunity for a hearing and without submitting its order for Presidential approval. At my direction, the Department of Justice challenged those procedures in court. The Board's order was vacated on the ground that a hearing should have been held. United States v. CAB, 539 F.2d 748 (D.C. CIR. 1976). The Court of Appeals indicated in the course of its opinion, however, that had a hearing been commenced, Board implementation of the route exchange pending completion of that hearing without submission of its interim order to the President would have been acceptable. Since the judgment in the case granted the United States all the relief it had sought, Supreme Court review of this dictum could not be obtained. I wish to advise you of my decision, based on consultation with the Department of Jus-

tice, not to accept the Court of Appeals statement with respect to interim implementation without Presidential approval of foreign route exchanges and of my intention to insist upon preimplementation submission for Presidential approval of such interim orders in the future. Where immediate action is needed, prompt Presidential attention to the submission will be accorded.

Respectfully,

s/ GERALD R. FORD

Honorable John E. Robson
Chairman
Civil Aeronautics Board
Washington, D.C. 20428

(61220)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRITISH AIRWAYS BOARD,

Petitioner,

against

CIVIL AERONAUTICS BOARD,

Respondent.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN being duly sworn, deposes and says that he is over the age of 18 years. That on the 21st day of March, 1977, he served three copies of the Petitioner's Reply Brief to

the attorney for the Respondent
by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorney at No. Civil Aeronautics Board, Washington, D.C.) ~~NXY~~, that being the address designated by him for that purpose upon the preceding papers in this action.

Irving Lightman

Sworn to before me this
21st day of March, 1977.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978